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No.

In the

Supreme Court of the United States

OCTOBER TERM, 1980

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC.,

Petitioner,

vs.

THE CITY OF EVANSTON, a municipal corporation,

Respondent.

On
Petition For A Writ Of Certiorari To The
Illinois Appellate Court, First District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED:

I WHERE PETITIONER CHURCH, SEEKING INJUNCTIVE AND DECLARATORY RELIEF AND/OR DAMAGES, PREVAILS ON ITS CLAIM THAT ITS DUE PROCESS RIGHTS WERE DENIED BY THE PASSAGE OF A CITY ORDINANCE, MUST IT ALSO PROVE THAT THE RESPONDENT MUNICIPALITY ACTED RECKLESSLY AND MALICIOUSLY IN ORDER TO PREVAIL UNDER 42 U.S.C. §1983 IN STATE COURT? MORE SPECIFICALLY, IN LIGHT OF *OWEN,* CAN A MUNICIPALITY INVOKE A DEFENSE THAT IT RELIED UPON THE ADVICE OF ITS CORPORATE ATTORNEY IN ENACTING A MUNICIPAL ORDINANCE WHICH RESULTED IN THE DENIAL OF PETITIONER CHURCH'S CONSTITUTIONAL RIGHTS?

II WAS IT ERROR FOR THE COURT BELOW TO DENY PETITIONER ATTORNEYS' FEES UNDER 42 U.S.C. §1988, WHERE PETITIONER CHURCH, SEEKING INJUNCTIVE AND DECLARATORY RELIEF AND/OR DAMAGES UNDER 42 U.S.C. §1983, PREVAILED ON ITS CLAIM THAT ITS DUE PROCESS RIGHTS WERE DENIED BY THE PASSAGE OF A CITY ORDINANCE REVOKING PETITIONER CHURCH'S SPECIAL USE ZONING PERMIT?

III WHERE PETITIONER CHURCH, POSSESSING A SETTLED EXPECTATION OF CONTINUED WORSHIP AT A PARTICULAR LOCATION WHICH WAS BASED ON ISSUANCE OF A SPECIAL USE ZONING PERMIT, LOST THAT PERMIT IN VIOLATION OF ITS PROCEDURAL DUE PROCESS RIGHTS AND UPON REAPPLICATION WAS DENIED ANOTHER PERMIT, WAS IT ERROR FOR THE COURT BELOW TO HOLD THAT PETITIONER'S FIRST AMENDMENT RIGHTS WERE NOT INFRINGED?

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OPINIONS BELOW

The Petition for Appeal as a Matter of Right, or, in the Alternative, Petition for Leave to Appeal, was denied by the Illinois Supreme Court on January 30, 1981. The denial appears in the appendix hereto, p. A66. The opinion of the Illinois Appellate Court in the second appeal of this case, review of which was sought in the Illinois Supreme Court, is reported at 89 Ill. App. 3d 701, 411 N.E. 2d 1030 (1st dist. 1980), and is reproduced in the appendix p. A1. The unreported opinion of the trial court below appears in the appendix at p. A38. The opinion in the first appeal of this case is reported at 53 Ill.App.3d 443, 368 N.E. 2d 644 (1st dist. 1977) and is also reproduced at p. A20 in the appendix. The first trial court's grant of summary judgment is in the appendix at A15.

JURISDICTIONAL GROUNDS

The Illinois Supreme Court's denial of the Petition for Appeal as a Matter of Right, or, in the Alternative, Petition for Leave to Appeal, was entered on January 30, 1981. *See* pp. 8, 9, infra.

This Petition for Writ of Certiorari is being docketed in this Court within 90 days from the denial of the Petition for Appeal as a Matter of Right, or, in the Alternative, Petition for Leave to Appeal below.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Art. VI, ¶2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . under the Authority of the United States, shall be the supreme Law of the Land. . .

Constitution of the United States, First Amendment:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech. . .

Constitution of the United States Fourteenth Amendment, §1:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of the United States, Fourteenth Amendment, §5:

> The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

42 U.S.C. §1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party in-

jured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. §1988:

In any action or proceeding to enforce a provision of section . . . 1983 . . ., the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

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PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

This case has a more than 7 year complicated factual and procedural history. The Petitioner, International Society for Krishna Consciousness (ISKCON) is a not-for-profit corporation registered in the State of Illinois. It embodies a religious movement (Vishna) that can be traced back to a Hindu-revivalist named Chaitanya, in India in the fifteenth century. There are about 45 to 50 million adherents to the Vishna tradition in India, with

about 15 million followers of the Krishna Consciousness movement narrowly speaking. The religious practices of the Krishna Consciousness Movement are set forth in numerous volumes of holy scriptures. The rituals involved in their movement embody seven separate devotions during any twenty-four hour period. These rituals involve incantations and chanting as part of their worship.

On August 8, 1972, the Petitioner entered into a lease for the rental of the property at issue here, which is located at 1014 Emerson Street, Evanston, Illinois. This property was the only temple for the worship of Krishna in the Chicago area. It was used as a place of worship, as a place of residence for devotees, and as a school for the teaching of Krishna Consciousness. At the time of trial 45 people lived there and the worshipping community consisted of between three to five thousand people.

On February 15, 1973, the Petitioner and the property-owner applied for a special use permit with the Evanston Zoning Board of Appeals.

On March 20, 1973, the Zoning Board of Appeals, after a public hearing, found that the special use standards were met and recommended a special use permit be granted.

On November 20, 1973, after further public hearings, the Zoning Board of Appeals again entered findings that the proposed use conformed to the special use standards and recommended a special use permit be granted.

On March 25, 1974, the Evanston City Council adopted an ordinance granting the Petitioner a special use permit subject to certain conditions.

On September 18, 1974, the Petitioner requested additional time to meet the requirements of the special use permit. In anticipation of being issued an extension of the special use permit, the Petitioner entered into a contract for architectural plans to correct code violations, as well as a construction contract.

On November 4, 1974, the City Council adopted an ordinance extending the time in which the Petitioner was to achieve code compliance to February 15, 1975. One day later, on November 5, 1974, Petitioner's contractor obtained building permits and work was commenced by the contractor.

On November 7, 1974, the Corporation Counsel of the City of Evanston, in a letter to the City Manager, rendered an opinion that the ordinance adopted November 4, 1974 was invalid because no public hearings were held first. This opinion by the Corporation Counsel was accorded great significance by Respondents, as well as by the Illinois Appellate Court.

On November 11, 1974, without notice to the Petitioner, the City Council adopted a Motion rescinding the Ordinance it adopted on November 4, 1974. Immediately after this action, the building permit issued to Petitioner's contractor was revoked, although the contractor was permitted to proceed with some work without permits where health and safety considerations were involved. Petitioner paid the contractor for such service. In all, the contractor was paid $19,606.07.[1]

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[1] The trial court sustained an objection to the contractor's testimony as to increased costs to complete work specified in the contractor's verified statement but which could not be completed after the permits were revoked. An offer of proof was made that $5,104.00 in damages resulted to plaintiff.

On February 20, 1975, Petitioner entered into an installment contract for a warranty deed for the property. On May 16, 1975, the Petitioner, now as contract purchaser, submitted a second application for special use permit. The Respondent allowed this application.

In October, 1975, the Zoning Board of Appeals held public hearings and found that the special use permit standards would be met and recommended granting a special use permit. A proposed special use permit was drafted. The Planning and Development Committee of the City Council conducted hearings on various dates.

At the committee meeting session of May 10, 1976, the application proceeded normally, and it was decided to notify the Petitioner that it "would be introduced May 24, 1976, and would be ready for adoption June 7, 1976."

On July 12, 1976, something happened to change the course of events. A written statement concerning certain alleged practices of the Krishna organization was submitted to the committee, and oral statements of objection were made by four individuals. A motion was passed recommending the City Council not concur with the Zoning Board of Appeals, but instead deny the special use permit. This motion was reaffirmed by the Committee on August 9, 1976.

The City Council met on September 13, 1976 and voted to deny the special use permit.

This action prompted the filing of a Complaint in the Circuit Court of Cook County on October 25, 1976. On November 1, 1976, Petitioner applied for a preliminary injunction, which was denied. On November 8, 1976, there was a substitution of attorneys on behalf of the Petitioner. A Motion to Reconsider was granted, and a hearing set. After the hearing, on November 16, 1976, the

Court denied the Motion for Preliminary Injunction. Petitioner amended its Complaint and answered the counterclaim of the Respondent which was filed earlier on October 29, 1976.

A Notice of Interlocutory Appeal to the Illinois Appellate Court was filed by the Petitioner on November 16, 1976. This appeal was docketed in the Appellate Court as #76-1500. Some months later, the trial court granted summary judgment to the Respondents, and on April 20, 1977, Petitioner filed its second Notice of Appeal. That appeal was docketed as case #77-573, and was consolidated with the earlier appeal. The Appellate Court reversed and remanded the case. *International Society for Krishna Consciousness, Inc.* v. *City of Evanston*, 53 Ill. App. 3d 443 (1st dist. 1977). (App. A20)

On remand, Petitioner filed its Second Amended Complaint.[2] Following a bench trial in the Circuit Court of Cook County, a Memorandum of Findings of Fact and Conclusions of Law and a Judgment Order were entered on August 21, 1978. (App. A38) Petitioner's Motions for Reconsideration of Order and Judgment and for Attorneys' Fees were both denied. (App. A64)

Petitioner filed its Notice of Appeal from certain portions of the judgment on December 29, 1978 and Respondents filed their Notice of Cross Appeal.

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[2] The Second Amended Complaint was in five counts. Counts I-IV were brought under 42 U.S.C. §1983. Counts I and II claimed Infringement of Free Exercise of Religion; Count III claimed a deprivation of due process; Count IV claimed deprivation of equal protection and due process of law; Count V claimed that the denial of the second special use permit was arbitrary and capricious; Counts VI and VII were for damages for the willful and malicious acts of the Respondent.

During the trial of this case, Petitioner was denied the right to introduce evidence of its denial of Equal Protection under the law. Offers of proof were made which Petitioner contends were relevant and material to the issue of denial of equal protection.

Because this was a significant issue in the appeal before the Appellate Court and because it is related to Petitioner's First Amendment claim, that offered testimony is summarized below.

Objections were sustained to all the following offers. Petitioner could not elicit how many applicants for special use permits had been required to make code repairs within 180 days as Petitioner was required. Petitioner could not elicit evidence concerning treatment accorded the Church of Scientology, whereby that Church was granted an extension of time exceeding three years in which to comply with the zoning ordinance. Petitioner could not elicit evidence that another applicant failed to meet imposed zoning conditions for some 3½ years.

The trial court sustained an objection to evidence concerning the relief requested by yet another applicant, Evanston Hospital. There the application was to allow redevelopment of several buildings. In November, 1973, an 18 month time limit was imposed for a zoning variance from the commencement of removal of existing parking while an expansion was added. Construction was still in progress in November, 1977. A payment in lieu of taxes covenant was not recorded until June 19, 1975, after being imposed in the original 1973 ordinance.

After the Court sustained an objection, an offer of proof was made that from January 1, 1973 to December 31, 1976, the Evanston Zoning Board of Appeals never

attached to a special use permit other than the Petitioner's a condition to achieve code compliance within a specific time period.

Similarly, the Court sustained an objection, and an offer of proof was made that from January 1, 1973 to December 31, 1976, the City Council never attached to a special use permit ordinance other than the Petitioner's a condition to achieve code compliance within a specified time period.

After an objection was sustained, an offer of proof was made that another applicant (Kendall Cleaning) asked to retain an illegal use as a nursery school before a special use permit was requested. There were numerous code violations involving health and safety. A special use permit was ultimately granted without any time limit conditions at all.

After an objection was sustained, an offer of proof was made as to a request by B'nai B'rith Foundation to convert an existing building, previously used as a residence, into a synagogue. A three-year extension was granted with respect to housing code violations.

An objection was sustained to a question concerning the Presbyterian Retirement Home. Extensions of time were granted to construct additions to the building. The extension was made in accordance with certain provisions of the Zoning Ordinance. It took the applicant from September, 1974, when the permit was granted, to December, 1977, and construction was still in progress. Respondent also introduced testimony from nearby residents that the chanting emanating from the temple caused noise and that parking and traffic problems increased. (App. A44, A45)

Finally, evidence was received during Petitioner's case in chief concerning the expenditures by the Petitioner

for legal fees arising out of their efforts to secure a special use permit for 1014 Emerson Street.

The trial court's judgment order granted Petitioner an injunction relating to Count I of the Second Amended Complaint, directing the Respondent to issue a special use permit. That part of the judgment order was not appealed from by the Petitioner. The trial court found that Respondent violated Petitioner's procedural due process rights, but that there was no violation of substantive due process or of equal protection. Petitioner was awarded $1 in nominal damages. Relief under the remaining Counts of the Complaint as well as attorneys' fees and compensatory damages were denied. (App. A52-A59) Petitioner appealed these denials to the Appellate Court.

The appellate court held (1) that the trial court properly excluded the evidence found in ISKCON's offer of proof, and that ISKCON failed to prove intentional discrimination against it (App. A7) and (2) that the revocation of the special use permit violated ISKCON's procedural due process rights, but that ISKCON "failed to meet its burden of proof . . . in failing to prove any intentional, malicious, or reckless conduct by Evanston when it circumvented Krishna's procedural due process rights." (App. A11) Consequently, the appellate court dissolved the injunction mandating issuance of a special use permit, vacated the award of nominal damages, and declared that ISKCON was not a "prevailing party" entitled to attorneys' fees under the Attorneys' Fees Awards Act of 1976, 42 U.S.C. §1988.

The appellate court rendered this decision on September 30, 1980. A petition for rehearing was filed on October 21, 1980. The petition for rehearing was denied on October 28, 1980. A Petition to Appeal as a Matter of

Right, or, in the Alternative, for Leave to Appeal from the judgment of the First District Appellate Court was filed with the Illinois Supreme Court on December 3, 1980. The questions presented in this Petition were:

(1) Whether the appellate court has erroneously construed and misapplied federal law and thus is in conflict with decisions of the United States Supreme Court;

(2) Whether the question presented is that of deprivation of First Amendment free exercise of religion and related deprivation of substantive and procedural due process rights;

(3) Whether the appellate court applied an erroneous legal standard in considering the issue of discriminatory treatment; and

(4) Whether the issues presented were moot.

The Petition was denied by the Illinois Supreme Court on January 30, 1981.

ARGUMENT

INTRODUCTION

Since at least last Term, it has been clear that state courts should entertain suits brought under 42 U.S.C. §1983[3] and it is axiomatic that state court judges are obligated by the supremacy clause to follow the law

[3] That statute provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

established by the Supreme Court in this area and to award attorneys' fees under 42 U.S.C. §1988. *Martinez* v. *California,* 444 U.S. 277 (1980); *Maine* v. *Thiboutot,* ....., U.S. ....., 100 S.Ct. 2502 (1980). But in order to give full and complete relief, local courts, once having accepted §1983 jurisdiction, must afford litigants the complete remedy required by Congress and this Court's prior decisions. *Id.* at 2507. The seeming reluctance of state courts to afford a full and complete forum for local litigants when serious rights are involved is at the heart of the present controversy. Not only are the rights of these particular parties at stake, but wider ramifications exist: the federal court docket, already overcrowded, could be pressed still further by litigants deterred from seeking an inadequate §1983 remedy in state court.

The seminal decisions in *Monell* v. *New York City Dep't. of Social Services,* 436 U.S. 658 (1978) and *Owen* v. *City of Independence,* 445 U.S. 622 (1980), seem clear enough: municipalities are "persons" under §1983; when sued, they may not claim a qualified immunity based on the good faith of their officials; and the statutory requirements will be met when "official policy [is] the moving force of the constitutional violation." *Monell,* 436 U.S. at 694. Last Term this Court made clear that §1983 plaintiffs need allege only two claims in order to maintain a cause of action under that statute: they must allege that some person has deprived them of a federal right and that the person who did so acted under color of state law. *Gomez* v. *Toledo,* ..... U.S. ....., 100 S.Ct. 1920 (1980).[4] Those requirements

[4] Qualified immunity defenses, when available, are part of the defendant's case and need not be pleaded by plaintiffs. *Id.* Here, of course, the Respondent may not ever invoke the good faith of its officials as a defense.

were clearly met by the Petitioner. Moreover, a constitutional violation was found, as the second appellate opinion explains:

> We therefore conclude that Evanston was not justified in proceeding as it did, and that the revocation constituted a *violation* of Krishna's *procedural due process* rights which was actionable in a court of law. And the under color of law requirement was met because it was the ordinance revoking the special use permit that caused the constitutional violation.

(App. A10) [Emphasis added]

Logically, then, Petitioner church should have been afforded relief. But the Illinois Appellate Court, in the second appeal, having conceded that Petitioner church was deprived of its constitutional right to procedural due process by an official action, nonetheless imposed an additional requirement upon Petitioner:

> [T]he plaintiff must demonstrate that the defendant has violated his rights in a malicious or reckless manner. This is true when the defendant is a municipal corporation as well as in any other case.

(App. A11)

This Court should announce what its previous decisions, as well as a significant body of federal case law, have implied: the passage of an ordinance which results in a constitutional deprivation to a plaintiff is the intent requred to be shown under §1983. To hold otherwise would blunt the remedial purpose of §1983 as well as the decisions in *Monell* and *Owen*.

I WHERE PETITIONER CHURCH, SEEKING INJUNCTIVE AND DECLARATORY RELIEF AND/OR DAMAGES, PREVAILS ON ITS CLAIM THAT ITS DUE PROCESS RIGHTS WERE DENIED BY THE PASSAGE OF A CITY ORDINANCE, MUST IT ALSO PROVE THAT THE RESPONDENT MUNICIPALITY ACTED RECKLESSLY AND MALICIOUSLY IN ORDER TO PREVAIL UNDER 42 U.S.C. §1983 IN STATE COURT? MORE SPECIFICALLY, IN LIGHT OF OWEN, CAN A MUNICIPALITY INVOKE A DEFENSE THAT IT RELIED UPON THE ADVICE OF ITS CORPORATE ATTORNEY IN ENACTING A MUNICIPAL ORDINANCE WHICH RESULTED IN THE DENIAL OF PETITIONER CHURCH'S CONSTITUTIONAL RIGHTS?

This Court should grant certiorari to review this question, as the standards set out in Supreme Court Rule 17 are met: the Illinois Supreme Court's failure to allow the Petition to Appeal as a Matter of Right, or in the Alternative, Petition for Leave to Appeal, lets stand the decision of the Illinois Appellate Court that Petitioner did not prove a cognizable claim under §1983 and it conflicts with this Court's decisions in *Monell* and *Owen,* with the Fourth Circuit's recent decision in *Huemmer* v. *Mayor and City Council of Ocean City,* 632 F.2d 371 (4th Cir. 1980), and with the intent standard required by the Seventh Circuit in *Bonner* v. *Coughlin,* 545 F.2d 565 (7th Cir. 1976) and its progeny. Moreover, the question raised is an important one which should be decided by this Court.

Monell indicates the clear expression of federal courts that the policy of a municipality has its highest expression

in its legislative enactments and therefore satisfies the "under color of law" requirement:

> Local governing bodies, therefore, can be sued directly under §1983 for monetary, declaratory or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, *ordinance,* regulation or decision officially adopted and promulgated by that body's officers.

Monell, 436 U.S. at 690. [Emphasis added]

The Second Circuit has declared that, under *Monell,* once the existence of an official policy is demonstrated by its embodiment in a municipal regulation (or ordinance), a fact-finder need only determine "whether the policy caused the injury to the plaintiff . . . and whether the municipality was entitled to some sort of qualified immunity" (now decided in the negative by *Owen*). *Turpin* v. *Mailet,* 619 F.2d 196, 199 (2d Cir. 1980).

In the instant case, the ordinance that revoked the special use permit caused the violation of Petitioner's constitutional rights. (App. A10) The remedy Petitioner sought included declaratory and injunctive relief; thus, even if damages were not assessed, the deprivation could have been remedied by declaring the revocation illegal and ordering the reinstatement of Petitioner's special use permit. A more difficult case is presented where the policy alleged to be unconstitutional is implicit, but that is not the case here.[5]

---

[5] It is therefore not possible to reconcile the appellate court's holding that Petitioner was denied procedural due process with its finding in light of *Owen* that the Petitioner did not prove "any intentional, malicious or reckless conduct by Evanston when it circumvented Krishna's procedural due process rights." (App. A11)

The Illinois court's opinion is internally inconsistent in finding a due process violation because of an official act, yet denying all relief. An affirmative and voluntary passage of a municipal ordinance disposing of the rights of parties in general and directed to a specific plaintiff is sufficient to meet the level of intent required. If not, then "under color of" and the dictates of *Monell* and *Owen* are eviscerated. The effect of this decision is to insulate a municipality from any liability. The decision completely disregards the express holdings of this Court in *Monell* and *Owen*.

Respondent's defense was reliance upon its corporate attorney's interpretation of its own zoning ordinance. This defense was argued[6] in the first appeal of this case and at the trial level and again at the second appeal. (App. A10, A25, A41) Each time this defense was argued, it was rejected:

> At both the trial level and before this court, Evanston attempted to justify its revocation of the special use permit extension by referring to the advice given by its corporation counsel. Counsel advised the city council of Evanston that a public hearing was necessary before the "extension" ordinance could be enacted, as that ordinance was in reality an amendment, and not merely an extension of the prior ordinance. Counsel believed that, since a hearing had not been held, the "extension" ordinance passed here was invalid.
>
> In *Krishna I* (citation omitted), we ruled that this was not a sufficient justification for Evanston's summary revocation of the extension. At no time subsequent to that ruling has Evanston offered any alternative justification for its revocation action. We therefore conclude that Evanston was not justified in

[6] The Respondent never produced any evidence that in fact it relied upon this advice.

> proceeding as it did and *that the revocation constituted a violation of Krishna's procedural due process rights* which was actionable in a court of law.

(App. A10) [Emphasis added]

Nothing, therefore, should have stood in the way of granting relief here under §1983. However, the appellate court held that Petitioner was not entitled to relief due to its "fail(ure) to prove any intentional, malicious, or reckless conduct by Evanston when it circumvented Krishna's procedural due process rights." (App. A11) The appellate court was incorrect: it required a greater intent than the law demands and it lumped three different standards (App. A11) together as if they were one and the same.

A §1983 plaintiff is not charged with the responsibility of showing the malice or recklessness of a municipal defendant (which would perhaps support punitive damages). The standard of general intent required by several circuits, including the Seventh, *see Bonner, supra; McDonald* v. *Illinois,* 557 F.2d 596 (7th Cir. 1977), *cert. denied,* 434 U.S. 966 (1977); *Jamison* v. *McCurrie,* 565 F.2d 483 (7th Cir. 1977); *Beard* v. *Mitchell,* 604 F.2d 485 (7th Cir. 1979), has been imported from the "background of tort liability" which guides construction of §1983 and "makes a man responsible for the natural consequences of his actions," *Monroe* v. *Pape,* 365 U.S. 167, 187 (1961). That intent is:

> an intent to bring about a result which will invade the interests of another in a way that the law will not sanction. The defendant may be liable although he has meant nothing more than a good-natured practical joke, or has honestly believed that he would

not injure the plaintiff, or even where he was seeking the plaintiff's own good.

W. Prosser, Handbook Of The Law Of Torts, 4th ed., 31-32 (1971) (hereinafter Prosser)

The correct intent standard is met where, as here, Petitioner shows a voluntary, affirmative act of official policy which causes a constitutional violation. A municipal corporation can only act through its agents (here, the Evanston City Council) and the council members would have known that a revocation of a special use permit was taking place without notice and a hearing and was "substantially certain" to result in loss of Petitioner's building permits. That, as a matter of law, meets the level of intent required by tort law. *Id.*

A further source of conflict in the appellate court's opinion is that it speaks of three types of intent as if they were one. In effect, the Illinois court has required Petitioner to prove bad faith. According to Prosser, the intent with which tort liability is concerned is distinguished from negligence, malice and recklessness. *Id.* at 32. The Illinois court appeared to derive its intent standard (which it proceeded to employ incorrectly) from the Seventh Circuit's requirements as articulated in *Bonner* and its progeny, including *Beard, supra.* The *Beard* court articulated this circuit's standard as it has developed: a plaintiff must demonstrate "intention" (defined as "the general intent to perform acts, the natural consequences of which were the deprivation of a constitutional right") *or* "reckless disregard" (defined as "conscious disregard [of] a substantial and unjustifiable risk that circumstances exist or that a result will follow and such disregard constitutes a gross departure from the care which a reasonable person would exercise in this situation") *Id.*, 604 F.2d at 493. But the Illinois

court ignored the disjunctive "or", saying that malice or recklessness is required and in effect, actually required a showing of bad faith:

> Numerous federal court decisions in this federal circuit have indicated that there is no remedy available in a §1983 action which is based upon the mere negligence of the defendant resulting in a violation of the plaintiff's protected rights. (citations omitted) Rather, the plaintiff must demonstrate that the defendant has violated his rights in a *malicious or reckless manner*. This is true when the defendant is a municipal corporation as well as in any other case. (citation omitted) In this case, the trial court found that there was not sufficient evidence to indicate any *bad faith* on the part of Evanston in revoking the extension ordinance. We therefore hold that Krishna has failed to meet its burden of proof under a section 1983 action in failing to prove any *intentional, malicious, or reckless conduct* by Evanston when it circumvented Krishna's procedural due process rights.

(App. A11) [Emphasis added]

In the footnote after the above quotation, the appellate court discusses this Court's decision in *Owen* and finds it inapposite because Petitioner had not met the intent standard the appellate court believed appropriate: "[H]ad Krishna met its initial burden of proof and demonstrated that Evanston had acted in an *intentional, malicious or reckless manner*, the latter would have been unable to escape liability on any good faith immunity basis." (App. A12) [Emphasis added] It is evident from these quotations that the court misapplied the intent requirement. The first time it refers to intent, it speaks of a "malicious or reckless manner" and then says that Petitioner failed to show any bad faith on the part of Respondent. The confusion is then heightened when, sev-

eral sentences later and in the corresponding footnote, it refers to, presumably, the same intent standard as requiring a showing of "intentional, malicious or reckless" conduct. The effect is that bad faith is the intent standard which emerges from the court's discussion. Clearly, this is error and the appellate court's misreading of the Seventh Circuit's standard of intent creates a conflict between its opinion and those cases. Moreover, none of those Seventh Circuit cases concerns a municipal defendant.

Interwoven in the appellate court's decision is the resurrection of a qualified immunity defense rejected in *Owen.*[7] The appellate court rejected the basis upon which the revocation was couched: requiring a public hearing. Seemingly, the court transfers the responsibility for the Respondent's actions to the advice of the City attorney. This advice would appear to be the basis of Respondent's immunity. But municipal corporations can only act through their agents. And whether the attorney's advice was correct or incorrect, rendered in good faith or not, is irrelevant when determining the voluntariness of the actions of the City Council. Neither the City Council members nor their attorney are defendants in this action. Does a litigant (as the logic of the appellate court's opinion implies) have a cause of action against the City

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[7] Indeed, the *Owen* Court specifically pointed out that municipal defenses are controlled by federal law and quoted *Hampton* v. *City of Chicago,* 484 F.2d 602, 607 (7th Cir. 1973): "A construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced." *Owen,* 100 S.Ct. at 1414.

Attorney for malpractice? Negligence? There is no alternative remedy.[8]

Moreover, the Illinois Appellate Court's opinion directly conflicts with the Fourth Circuit's opinion in *Huemmer, supra,* 632 F.2d at 372, where the City was found liable under §1983 for a denial of procedural due process and its defense, "reliance on an apparently regular ordinance whose constitutionality had never been questioned," was disallowed under *Owen.* The court equated this defense with the qualified immunity struck down in *Owen*:

> The Supreme Court's holding makes inappropriate any consideration of the question whether the city had a basis for contending it was acting in good faith since the ordinance had never previously been attacked, even though, from closely related cases, the unconstitutionality of the ordinance was evident.

Huemmer at 372, fn. 4.

After *Monell* and *Owen,* it is sufficient to meet the requisite level of intent for a plaintiff to demonstrate that official policy or an official enactment caused a constitutional violation, *supra* at 16. These cases stand for the proposition that §1983 was intended to provide a remedy for those who are able to show that a munici-

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[8] "[T]here is no remedy available in a §1983 action which is based upon the mere negligence of the defendant resulting in a violation of the plaintiff's protected rights. . ." (App. A11)
"Counsel advised the city council of Evanston that a public hearing was necessary before the 'extension' ordinance could be enacted. . . (App. A10)
The reference to "mere negligence" seems clearly related to the inaccurate or erroneous advice offered by the City Attorney and accepted by the City Council.

pality, acting under color of state law, caused a constitutional violation.* Nothing additional is required:

> The knowledge that a municipality will be liable for all of its injurious conduct, whether committed in good faith or not, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights.

Owen, 100 S.Ct. at 1416.

II WAS IT ERROR FOR THE COURT BELOW TO DENY PETITIONER ATTORNEYS' FEES UNDER 42 U.S.C. §1988, WHERE PETITIONER CHURCH, SEEKING INJUNCTIVE AND DECLARATORY RELIEF AND/OR DAMAGES UNDER 42 U.S.C. §1983, PREVAILED ON ITS CLAIM THAT ITS DUE PROCESS RIGHTS WERE DENIED BY THE PASSAGE OF A CITY ORDINANCE REVOKING PETITIONER CHURCH'S SPECIAL USE ZONING PERMIT?

Section 1988 provides: "In any action or proceeding to enforce a provision of section . . . 1983 . . . , the

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*The appellate court recognized that impact of *Carey* v. *Piphus,* 435 U.S. 247, 266 (1978) as it affects the violation of a plaintiff's procedural due process rights: "[P]rocedural due process rights are viewed as absolute in a sense because of their importance to organized society. Thus, deprivation of such rights, even without a showing of actual injury, nevertheless requires vindication of those rights through the award of nominal damages." The logic of *Carey,* then, to this case, is that Petitioner's substantive rights were violated and not its "mere" procedural rights. In other words, the Petitioner here would be entitled to substantial damages "even without a showing of actual injury." *See Konczak* v. *Tyrrell,* 603 F.2d 13, 17 (7th Cir. 1979), *cert. denied,* 100 S.Ct. 668 (1980).

court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." There can be no question that Petitioner church is a prevailing party in the instant litigation by whatever standard a court applies. *Maher* v. *Gagne*, ... U.S. ....., 100 S.Ct. 2570 (1980); *Thiboutot, supra*, 100 S.Ct. 2502; *New York Gaslight Club, Inc.* v. *Carey*, ... U.S. ....., 100 S.Ct. 2024 (1980). The opinion of the Illinois Appellate Court conflicts directly with the above decisions of this Court and most of the federal circuits.[10]

The touchstone is that Petitioner essentially succeeded in obtaining the relief it was seeking. *Maher, supra*, 100 S.Ct. at 2575. On the merits, a due process violation was found, *supra*, at 14-15. As quoted in *Maher* at 2575: "[T]he Senate report expressly stated that 'for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief. S.Rep. No. 94-1011, p. 5 (1976)." As the Court confirmed in *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412 (1978), Title VII [1983] plaintiffs are the chosen instrument of Congress to vindicate the rights of parties.

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[10] *See Perez* v. *Rodriguez Bou*, 575 F.2d 21 (1st Cir. 1978); *Mid-Hudson Legal Services, Inc.* v. *G & U, Inc.*, 578 F.2d 34 (2d Cir. 1978); *Skehan* v. *Bd. of Trustees*, 590 F.2d 470 (3d Cir. 1978); *Bonnes* v. *Long*, 599 F.2d 1316 (4th Cir. 1979); *Williams* v. *City of Fairburn, Georgia*, 640 F.2d 635 (5th Cir. 1981); *Ramos* v. *Koebig*, 638 F.2d 838 (5th Cir. 1981); *Northcross* v. *Board of Ed. of Memphis City Schools*, 611 F.2d 624 (6th Cir. 1979); *Entertainment Concepts, Inc. III* v. *Maciejewski*, 631 F.2d 497 (7th Cir. 1980); *Bond* v. *Stanton*, 630 F.2d 1231 (7th Cir. 1980); *Pickett* v. *Milam*, 579 F.2d 1118 (8th Cir. 1978); *Sethy* v. *Alameda County Water Dist.*, 602 F.2d 894 (9th Cir. 1979).

Therefore, attorneys' fees are awarded routinely to plaintiffs, whereas defendants can only be awarded fees where evidence exists of bad faith on the part of plaintiffs. *Id.* at 416, 417.

It was manifestly unnecessary for Petitioner to show bad faith on the part of the municipality here in order to be entitled to relief, including attorneys' fees. As discussed *supra* at 17-18, a showing of bad faith is not required under *Owen*. Additionally, if a showing of bad faith were necessary, §1988 would be rendered superfluous, because the traditional common law American rule regarding attorneys' fees is to award them where bad faith is found. In fact, §1988 was enacted to partially override *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240 (1975), which had reaffirmed the American rule in the absence of express legislative direction to the contrary. *See also* Note: *Promoting the Vindication of Civil Rights Through the Attorney's Fees Awards Act,* 80 COLUM. L. REV. 346, 350 (1980). Furthermore, the fact that neither Congress nor the courts have required a showing of bad faith in order for prevailing plaintiffs to be awarded fees under §1988 is a reflection and corroboration of the fact that such an intent standard is not part of a substantive §1983 claim either.[11]

Even where a qualified immunity is arguably available to a defendant, a plaintiff needn't demonstrate the existence of bad faith in order to defeat the immunity, for it is elementary that a lack of good faith doesn't necessarily imply the presence of bad faith. There is therefore no foundation on which to rest the Illinois

[11] The Court used this mode of reasoning in *Monell* at 608-609 to support its holding by demonstrating that Congress explicitly included municipalities as entities which might be required to pay fees under §1988.

Appellate Court's holding that Petitioner is not a prevailing party because it didn't demonstrate bad faith and that on that basis it should also be denied attorneys' fees under §1988.

Moreover, this case also raises the related question whether Petitioners should be awarded fees under §1988 when they prevail on state common-law claims derived from a nucleus of operative fact in common with their §1983 claim. Here, the trial court found that "the defendant's revocation of the extension of time without affording the plaintiff an opportunity to disprove the action was arbitrary and capricious and without procedural due process of law to the person affected thereby." (App. A46) Under *Maher,* the answer to the question posed above would seem to be yes. The Sixth Circuit, in *Seals* v. *Quarterly County Court,* 562 F.2d 390 (6th Cir. 1977), answered this question in the affirmative, in reliance on the legislative history of §1988. *Id.* at 392-394. *See also Harradine* v. *Bd. of Suprs. of Orleans County,* 425 N.Y.S. 2d 182 (App.Div. 1980).

This question is important because the improper use of a court's narrow discretion to deny fees can damage the utility of the statute by discouraging attorneys from accepting otherwise meritorious cases. *See* Note, 80 COLUM. L. REV. at 365-366. Abuses of discretion threaten the position of attorneys' fees awards as an integral part of the §1983 remedy. Finally, when it is in state courts that fees are denied, federalism concerns are raised, *Thiboutot* at 2507, fn. 12. State courts may not ignore the rules laid down by Congress and this Court. By abusing its discretion to deny fees, the Illinois Appellate Court is in effect driving more future plaintiffs into federal court and away from state courts. The magnitude of this question is great and it demands resolution.

III WHERE PETITIONER CHURCH, POSSESSING A SETTLED EXPECTATION OF CONTINUED WORSHIP AT A PARTICULAR LOCATION WHICH WAS BASED ON ISSUANCE OF A SPECIAL USE ZONING PERMIT, LOST THAT PERMIT IN VIOLATION OF ITS PROCEDURAL DUE PROCESS RIGHTS AND UPON REAPPLICATION WAS DENIED ANOTHER PERMIT, WAS IT ERROR FOR THE COURT BELOW TO HOLD THAT PETITIONER'S FIRST AMENDMENT RIGHTS WERE NOT INFRINGED?

The direct and natural consequence of the Respondent's affirmative and voluntary act in denying Petitioner's extension of time for its special use permit was to deny it the free exercise of religion. The trial court was content to rest its opinion on the substantial but narrow prong of procedural due process. (App. A47, A48) The consequence of this decision has been to confuse substance with procedure and to create a strained and contorted dichotomy. The barrier thus erected leads inevitably to the subordination of our most precious freedom to the whim of governmental officials. Inevitably a first amendment case involves a due process claim as well. This is so whether a licensing ordinance is at stake as in *Murdock* v. *Pennsylvania,* 319 U.S. 105 (1943), or *Hynes* v. *Mayor and Council of Borough of Oradell,* 425 U.S. 610 (1976) or *Freedman* v. *Maryland,* 380 U.S. 51 (1965) or a zoning ordinance is brought into question, *Columbus Pk. Congregation* v. *Bd. of Appeals,* 25 Ill.2d 65 (1962).

Protection of the free exercise of religion has been accorded a special place in our jurisprudence. *Sherbert* v. *Verner,* 374 U.S. 398 (1963); *West Virginia State Bd. of Education* v. *Barnette,* 319 U.S. 624 (1943); *Cantwell* v. *Connecticut,* 310 U.S. 296 (1940). Burdens upon this free

exercise have been highly disfavored by this Court. And those burdens may be indirect as well as direct. *Thomas* v. *Review Board,* ..... U.S. ....., 49 U.S.L.W. 4341 (1981); *McDaniel* v. *Paty,* 435 U.S. 618 (1978); *Sherbert, supra; Braunfeld* v. *Brown,* 366 U.S. 599 (1961).

That it is freedom of religion that is involved here is further evidenced by the claim of Respondent that the Petitioner's religious observances or practices are objected to, *supra* at 7. The "noise" referred to was ISKCON's members' chanting, an integral part of their religious worship, *supra* at 2. Nonetheless, the Illinois Appellate Court characterized this controversy as "essentially a zoning dispute" (App. A1) and it refused to uphold the trial court's finding that "the denial of the plaintiff's right of worship at this location, upon the speculative fears of parking and traffic congestion, bears no reasonable relation to the general health, safety, morals or welfare of the defendant." (App. A45) Although a municipality's police powers as exercised in its zoning restrictions are broad, they do not override the mandate of the Constitution. *Moore* v. *East Cleveland,* 431 U.S. 494 (1977). The question presented here involves a conflict between those rights.

The burden imposed on religion here—the denial of ISKCON's right to worship at this location—is substantial, albeit indirect. Although it could be argued that ISKCON is free to worship in another location, that argument is insufficient to defeat the very real existence of a burden on worship in this situation. The importance of unimpeded, uninterrupted ability to worship is central to the confidence worshippers require in order for a church to continue and thrive. Being forced to move elsewhere can be not only a very disruptive experience, but the end result of prohibiting worship in such commercially-zoned

areas as the one at issue here could be tantamount to the forced migration declared unconstitutional in *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972). *See also Columbus Park, supra.* Thus, the burden imposed on religion here is no more collateral than other indirect burdens on the free exercise of religion struck down by this Court. See *Thomas, supra; McDaniel, supra.* In the analogous area of free speech, this Court has stated: "(O)ne is not to have the exercise of his liberty of expression abridged on the plea that it may be exercised in some other place." *Schneider* v. *State*, 308 U.S. 147, 163 (1939). *See also Virginia Pharmacy Bd.* v. *Virginia Consumer Council*, 425 U.S. 748, 757, fn. 15 (1976); *Spence* v. *Washington*, 418 U.S. 405, 411, fn. 4 (1974). Surely the free exercise of religion merits similar protection.

When first amendment claims arise, the legal test is to determine the compelling need of the municipality over the rights of the one enjoying first amendment protection. It is also required to determine whether the government could have pursued a less restrictive alternative to meet its legitimate goals. The burden is on this Respondent with respect to the above. *Thomas* at 4344; *Yoder, supra*, 406 U.S. at 215. This Court should grant plenary review in this case to decide that where such a serious clash arises between competing first amendment and zoning interests, the standards employed in *Thomas, McDaniel* and *Sherbert* should govern in the zoning context presented here.

Furthermore, the first amendment question was compounded by the discriminatory treatment accorded Petitioner. Since the appellate court held that first amendment rights were not involved, it applied an incorrect legal standard when considering this issue. Requiring that purposeful and intentional discrimination be shown, a standard adopted from non-first amendment equal protection

analysis, the Illinois court refused evidence as immaterial and irrelevant which would have shown dissimilar treatment of other religious and social service groups in Evanston, *supra* at 6-7. These groups obtained special use permits in analogously zoned areas, although their presence would result in similar concerns about traffic and noise. Moreover, they did not have the same restrictive time limits imposed on their permits as did Petitioner, *supra* at 7. Employing the test of *Walz* v. *Tax Commission* 397 U.S. 664, 669 (1970)—that it is the effects of state action that are crucial when a first amendment religious discrimination issue is raised—the evidence should have been admitted.

This question is important and asks for resolution by this Court because of the clash of strong interests involved. The Court has not answered this precise question in the zoning context. First amendment rights cannot be lost sight of in the name of broad powers of zoning.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Court to grant this Petition for Writ of Certiorari.

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